either the purposes or the provisions of the law. They must begin again. The principle of the Ordinance may be obscurely expressed but it really comes to this: — Pre-war buildings — pre-war rents, plus the scheduled percentage, plus increased assessment and, in some cases, a discretionary allowance for compulsory or agreed improvements. This covers all ordinary cases; it is not exhaustive; the Board have a discretion to deal with special cases but the margin for the exercise of that discretion is not wide and it must be exercised on the principles to be gathered from the Ordinance. One of these clearly is that any special grounds for allowing an increase must relate to the particular building. For example, evidence that the pre-war rent of the building in question had been fixed in special circumstances and was abnormal at that time might well be relevant.

The whole group of applications must go back to the Board to be reconsidered *ab initio* and decided with regard to the construction of the Ordinance and the principles of its application set out in this judgment.

Order accordingly.

Solicitors for the tenants: *Drew & Napier.*

Solicitors for the landlords: *Donaldson & Burkinshaw.*

Re MOHAMED YUSOFF MEERA HUSSAIN & ANOR. TRADING AS FEDERAL DRUG HOUSE.

[O. C. J. (Spenser Wilkinson, J.) January 11, 1954]

[Penang — Bankruptcy No. 8 of 1952]

Bankruptcy Ordinance — Offences under s. 114 — What evidence required before debtor can be sentenced to imprisonment — Notes of public examination are not evidence unless properly put in.

This was a motion by the Official Assignee asking for an order that the bankrupts be ordered to undergo imprisonment under the provisions of section 114 of the Bankruptcy Ordinance on the grounds (1) that having been engaged in trading or other business they failed to keep such books of account as to sufficiently disclose their business transactions and financial position within one year immediately preceding the bankruptcy contrary to section 114(a) of the Bankruptcy Ordinance and (2) that they in 1951 and subsequently contracted debts payable in bankruptcy to various persons without having any reasonable ground or expectation of being able to pay contrary to section 114(c) of the Bankruptcy Ordinance. The motion was supported by an affidavit by the Assistant Official Assignee in which reference was made to the public examination of the debtors but the notes of the examination were not exhibited to the affidavit.

Held: (1) as the notes of the examination were not exhibited to the affidavit they were not properly before the Court and therefore there was insufficient evidence before the Court to enable it to make an order of imprisonment against the debtors; (2) in most cases the admissions by a debtor made in his public examination are not sufficient evidence by themselves to justify an order of imprisonment; (3) in proceedings under section 114(c) of the Bankruptcy Ordinance the particular debt or debts which are alleged to have been contracted without any reasonable expectation of being able to pay should be specified in the charge; (4) before a debtor can be sentenced to imprisonment for failure to keep books of account under section 114(a) of the Bankruptcy Ordinance, there must be evidence that he was guilty of such commercial immorality or such negligence in connection with the keeping of his books as to justify the imposition of the sentence of imprisonment.

Cases referred to:—

(1) *Re Khoo Siok Wan and Sarkies Johannes & Co.* 11 S.S.L.R. 19.

(2) *Re Chops Loh Ban Chuan and Chuan Bee — Ex parte Lim Eng Hoe* (1933) S.S.L.R. 585; (1933) M.L.J. 286.

(3) *Pollard's case* L.R. 2 P.C. 106.

(4) *Chong Hong Kian v. Sir Francis T. Piggot* (1909) A.C. 312.

(5) *In re Caldwell* 2 Ch. App. 26.

(6) *Poi Eng Lian v. The Official Assignee, F.M.S.* (1947) M.L.J. 126.

(7) *Re Mohamed Madar Sahib* 12 S.S.L.R. 10.

(8) *Re Chua Yew Chin, Chop Ho Lee* Singapore — Bankruptcy No. 23 of 1901 (unreported).

(9) *Ex parte Reed* 17 Q.B.D. 244.

(10) *In re Heap,* 4 Morr. 314.

(11) *Re Ang Teck Say* (1933) S.S.L.R. 408 at page 413; (1934) M.L.J. 25 at page 28.

BANKRUPTCY.

Balwant Singh (Asst. Official Assignee) for Official Assignee.

R. D. Hume for debtors.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — This was a Motion by the Official Assignee asking for an Order that the two bankrupts be ordered to undergo imprisonment under the provisions of section 114 of the Bankruptcy Ordinance on the following grounds:—

1. That you having been engaged in trading or other business have not kept such books of account as to sufficiently disclose your business transactions and financial position within one year immediately preceding your bankruptcy contrary to section 114(a) of the Bankruptcy Ordinance (S.S. Cap. 45).

2. That you have in 1951 and subsequently contracted debts provable in your bankruptcy to various persons without having any reasonable ground or expectation of being able to pay contrary to section 114(c) of the Bankruptcy Ordinance (S.S. Cap. 45).

The Motion was supported by a short affidavit by the Assistant Official Assignee in which he made reference to the public examination of the debtors.

But although the public examination was thus referred to the notes were not exhibited to the affidavit. On the hearing before me on the 14th December, 1953 the notes of the public examination were relied upon by the Official Assignee without objection on the part of Counsel for the debtors and it was not until after this hearing that I observed that the notes had not been exhibited to the affidavit and were not, therefore, properly before me. In view of the provisions of Rule 273 of the Bankruptcy Rules and the decision in the case of *Re Khoo Siok Wan and Sarkies Johannes & Co,*[1] I think there can be no doubt that the notes of the public examination must, on a motion under section 114 of the Bankruptcy Ordinance, be put in as evidence in the ordinary way. Such notes are not evidence in support of a motion merely by reason of the fact that they are on the Court file.

I therefore put the matter down for further argument when Mr. Hume on behalf of the debtors took the point that as the notes of the public examination had not been exhibited to the affidavit there was no evidence before the Court against these debtors, except the two short references made in the affidavit to admissions that had been made in the course of the public examinations. Mr. Hume admitted that the point was one which, strictly speaking, should have been taken at the outset, but he pointed out that as the copy of the affidavit served upon him had the notes of the public examination actually attached to and bound up with the affidavit he had been misled into thinking that those notes had in fact been exhibited, and he contended that there being in fact no evidence before the Court an order for imprisonment could not be made against the debtors under section 114 of the Ordinance.

On behalf of the Official Assignee Mr. Balwant Singh submitted that this omission to exhibit the notes of the public examination to the affidavit was a mere irregularity which could be cured under either section 91 or section 128 of the Bankruptcy Ordinance and he asked leave to amend the affidavit by exhibiting the notes of the public examination thereto.

Section 128 is very wide in its terms, but I do not think it really assists the Official Assignee in this case. It provides that no proceeding in bankruptcy shall be invalidated by any formal defect or irregularity. I do not think, however, that there is any question here of invalidating any proceedings; it is a question rather as to whether or not there was evidence before the Court upon which it could act.

With regard to section 91 Mr. Hume submitted that this really applied only to civil matters, but I think that it is sufficiently wide in its terms to cover any proceedings under the Bankruptcy Ordinance. Sub-section (3) of that section reads as follows :—

> "(3) The Court may at any time amend any written process or proceeding upon such terms, if any, as it thinks fit to impose."

I think the expression "any proceeding" is sufficiently wide to include criminal matters and therefore I would have power to allow the Official Assignee to amend his affidavit if I thought that this was a case in which it would be proper to do so. For reasons which will appear hereafter, however, I do not think that a mere formal amendment exhibiting the notes of the public examination so as to make them part of the evidence in support of the Motion would be sufficient to entitle the Official Assignee to an order in terms of the Motion, and I was, therefore, not prepared to exercise my power of amendment. This being so there was clearly insufficient evidence before me to enable me to make an order of imprisonment against the debtors and I intimated after hearing the further argument that no order of imprisonment would be made.

With regard to the correct procedure under section 114 of the Bankruptcy Ordinance there was in the past a considerable difference of judicial opinion until 1925 when the decision of the Court of Appeal was given in the case of *Re Chops Loh Ban Chuan and Chuan Bee — Ex parte Lim Eng Hoe*[2]. This case was not actually reported until 1933.

The main decision in that case can be seen, when analysed, to have three aspects. It decides (a) that the judge cannot act *ex proprio motu;* (b) that he cannot act summarily and (c) that the application by the Official Assignee on motion must be conducted to a large extent in accordance with the general principles of our criminal procedure. Had that Court merely decided that the judge must not act summarily but should give the debtor time to engage Counsel and prepare a defence I think it would have been in accordance with the Privy Council's decisions in *Pollard's case*[3] and *Chong Hong Kian v. Sir Francis T. Piggott*[4] but in deciding that the Judge could not act *ex proprio motu* and that the general principle of a criminal trial must be applied the decision overruled a considerable body of earlier *dicta* to the contrary. Indeed, the appeal was from the decision of Whitley, J., for whose opinion upon any matter concerned with the criminal aspect of the law I have the profoundest respect. To my mind this decision of the Court of Appeal has destroyed the value of section 114 of the Ordinance. An application by motion in the High Court supported by affidavit is a most unsatisfactory method of trying a criminal case; and unless the judge is allowed to act *ex proprio motu* (subject to the kind of safeguards which the Privy Council laid down in

regard to proceedings for contempt) the section becomes a very difficult one to work. Whether a Court of Appeal would, after all these years, be prepared to reverse a decision which has stood so long I do not know; but I feel that I am bound by the decision and must accept its full consequences. One of these consequences is, I think, that in most cases admissions by a debtor made in his public examination are not sufficient evidence by themselves to justify an order of imprisonment. In this connection Barrett-Lennard, J. in the case under consideration made the following remarks in regard to a debtor's position at his public examination :—

"His situation is peculiarly defenceless, since the examination commonly extends to all matters which the Court may take into consideration on the application for his discharge: and he has no advocate. I think that, in view of the position of the debtor during his public examination, it is of primary importance that, subject to any decisive direction from the Legislature he should not be sent to prison, or otherwise injuriously affected, simply on account of what he may then say."

It seems to me, with respect, that this last sentence goes somewhat further than was necessary for the decision of the case; and in any case I do not think that the words "or otherwise injuriously affected" were intended to limit in any way the effect of section 33 of the Ordinance which provides for the refusal or suspension of a debtor's discharge in respect of offences similar to those dealt with in section 114. But as far as imprisonment is concerned I think it would be contrary to the principles underlying the decision of the *Chops Loh Ban Chuan and Chuan Bee*[2] case to deprive a debtor of his liberty merely upon admissions extracted from him in the circumstances described in the above quoted passage. In the present case there clearly was other evidence available because there was an auditors' report and the auditors could have given evidence; and there may also have been further evidence available in support of the charges preferred against the bankrupts. All such evidence should, in my view, have been adduced.

Although it is not mentioned in the headnote the *Chops Loh Ban Chuan and Chuan Bee*[2] case appears to me to have decided another important point; that is that it is not proper simply to charge a debtor generally with having contracted debts provable in bankruptcy without any reasonable ground or expectation of being able to pay them, but that the debts complained of must be specified. In view of the fact that there is a later decision which appears to conflict with this view I think it necessary to consider carefully exactly what the Court did decide in the *Chops Loh Ban Chuan and Chuan Bee*[2] case regarding the form of the charge. The President of the Court of Appeal expressed no opinion on this particular point, being content to decide that the summary proceedings adopted by the Court below were irregular. The following are the material passages from the judgment of Barrett-Lennard, J. :—

"I observe that one of the grounds of appeal is that the charge..... was too wide and general, and that the appellant should have been called upon only to deal with specific and specified debts. The debts, in respect of which the offence was supposed to have been committed, were those incurred to Indian moneylenders during the period between February and August, 1924. The number was about twenty-five. The practice of the Courts in England under section 26(3)(d) of the Bankruptcy Act, 1914 has been, and is, to require the debts, which are alleged to have been contracted without reasonable expectation of being able to pay them, to be specified, so that the Court may apply its mind to all the circumstances under which they were contracted. And it is not enough to show that the debtor has contracted in the aggregate a greater amount of debts than he could reasonably expect to pay: see **In re Marks** (1 Ch. App. 334), **In re Caldwell** (2 Ch. App. 26) and **In re Ainsworth** (3 Ch. App. 244). Therefore, if I had agreed that a judge can act **ex proprio motu**, I should yet have said that the order of the 15th September could not stand."

Deane, J. in his judgment after dealing with the same point at some length said :—

"In my opinion the circumstances under which each particular debt was contracted had to be considered, and the guilt or innocence of the accused arrived at with reference to that particular debt, and it was wrong to lump all the debts together and call upon accused to shew cause with respect to all of them. ..... To charge the debtor with regard to a large number at once each of which might be the subject of a separate charge, and with regard to each of which he has to account — seems to me totally unjustifiable.

For these reasons I think that this appeal should be upheld."

It will be seen that as far as the judgment of Deane, J. was concerned the question of the form of the charge was one of his main grounds for allowing the appeal. In the case of Barrett-Lennard, J. his main ground was that the Judge should not have acted *ex proprio motu*, but it seems clear to me that he rested his decision also on the second ground, that the charge was too wide. The result in my opinion is that the Court of Appeal decided by a majority as a matter of principle that in cases of this kind particular debts should be specified. In so doing they were following the English cases referred to in the judgment of Barrett-Lennard, J. in particular the case of *In re Caldwell*[5].

I must now consider the later case of *Poi Eng Lian v. The Official Assignee, F.M.S.*[6] which was decided in November, 1941 but not reported until 1947. The report in this case is very unsatisfactory. The Court is said to have consisted of the Chief Justice, F.M.S., the Chief Justice, S.S. and Aitken, J., but the only judgment printed is that of McElwaine, C.J. This is clearly his own judgment and not the judgment of the Court and there is nothing in the report to indicate whether the other two Judges gave any judgments or

whether they concurred with the judgment delivered by McElwaine, C.J., and if so, to what extent they concurred.

Apart from the unsatisfactory nature of the report of this case it is to be noted that even if the reported judgment is to be taken as the decision of the Court of Appeal it was the Court of Appeal of the Federated Malay States and was decided upon the Bankruptcy Enactment and Rules of the Federated Malay States which, although in many respects identical with the Bankruptcy law of the Straits Settlements, undoubtedly differed from it in some respects. On the other hand the *Chops Loh Ban Chuan and Chuan Bee*[2] case was decided by the Court of Appeal of the Straits Settlements in Penang upon the Bankruptcy Ordinance and Rules of the Straits Settlements and has stood, as far as I am aware (apart from the judgment of McElwaine, C.J.) undisturbed and uncriticised since 1925. In so far as the decisions in these two cases may conflict I feel bound in this Settlement to follow the decision of the Court of Appeal of the Straits Settlements rather than that of the Federated Malay States.

Moreover, I find the judgment of McElwaine, C.J. a little difficult to understand. In his judgment he sets out the provisions of section 111 of the Enactment (which is the same as section 116 of the Ordinance) and concludes from this that a charge under section 114 may be entirely general in its terms. But there had been earlier decisions, which were apparently not drawn to his attention, to the effect that the matters referred to in section 114 of the Ordinance have not been referred to by the Legislature as "offences" and that, therefore, the words in section 116 "in a charge for an offence under this "Ordinance" do not apply to proceedings under section 114 (*Re Mohamed Madar Sahib*[7]) — see remarks of Sercombe Smith, J. at page 12: see also the remarks of Hyndman Jones, C.J. in *Re Chua Yew Chin, Chop Ho Lee*[8] referred to in his judgment in *Khoo Siok Wan and Sarkies Johannes & Co.*[1] at page 25.

Again although the *Chops Loh Ban Chuan and Chuan Bee*[2] case was cited to the later Court of Appeal McElwaine, C.J. said this :—

"We were referred to the Court of Appeal case of Chop Loh Ban Chuan and Chuan Bee but that case appears to have little bearing on the present. What that case decided was that the Judge before whom the public examination was held could not, ex proprio motu, at the close of the examination, call upon the bankrupt to show cause and then on his failure to show cause, commit him to prison."

I can only assume that although the case of *Chops Loh Ban Chuan and Chuan Bee*[2] was referred to the Court it was not fully cited, as the learned Chief Justice makes no reference whatsoever to the passages in the judgments of the earlier case which I have set out above.

For these reasons I follow the decision of the Court of Appeal in the case of *Chops Loh Ban Chuan and Chuan Bee*[2] and the practice of the English Courts referred to in the case of *Re Caldwell*[5] and hold that in proceedings under section 114(c) of the Bankruptcy Ordinance a particular debt or debts which are alleged to have been contracted without any resonable expectation of being able to pay should be specified in the charge. This was not done in the present case and I would not, therefore, have been prepared to act under section 114 in respect of this allegation.

This leaves the charge of failing to keep proper books of account. The Assistant Official Assignee cited some English authorities to me in which the Judges expressed the view that failing to keep proper books was a serious offence (*Ex parte Reed*[9] and *In re Heap*[10]). Seriousness, however, is a matter of degree, and it is to be observed that in neither of these two cases was the question under discussion whether or not the debtor was to be imprisoned: in the one case it was whether or not a scheme of arrangement should be approved; and in the other whether or not there should be an absolute discharge or a suspended discharge of the debtor.

Mr. Hume on behalf of the debtors argued that before the debtors could be imprisoned under this provision a guilty intent must be proved. I am unable to go all the way with him on this point, but I am prepared to agree that before imprisonment is imposed there must be something more serious in what the debtor has done than would merely justify the Court in refusing an unconditional discharge or refusing to sanction a scheme of arrangement.

I derive some assistance on this point from a passage in the judgment of Huggard, C.J. in the case of *Ang Teck Say*[11]. That was a case of failing to produce books to the Official Assignee and was, therefore, somewhat different from the present case but I nevertheless think that the passage is pertinent to the question now before me. It reads as follows :—

"In these circumstances it appears to me that, although the bankrupt has in fact failed to produce his books as required by section 114(b) and has by his failure rendered himself liable to imprisonment, he has not been proved to have been guilty of any such fraud or commercial immorality or even such negligence in connection with the non-production of those books as to justify the imposition upon him of a sentence of imprisonment under the section."

I am inclined to think, therefore, having heard the evidence of one of the debtors that the debtors were not in this case proved to have been guilty of such commercial immorality or such negligence in connection with the keeping of their books as to justify the

imposition upon them of a sentence of imprisonment under the section.

For these reasons I would not have been inclined, even if the notes of the public examination had been properly before me, to exercise my powers of imprisoning the debtors in the present case.

Order accordingly.

Solicitors for the debtors: *Hogan, Adams & Allen.*

SI TOH FOK TIAK TRADING AS CHOP WING LOONG v. CHOP SWEE KEE & CO.

[A. C. J. (Bellamy, J.) December 8, 1953]

[Malacca — Civil Appeal No. 4 of 1953]

Evidence — Fresh trial — Admissibility of evidence in — Reception in evidence of depositions in former trial — Witnesses present — ss. 33 and 167 of Evidence Ordinance, 1950.

At the rehearing of a case, the learned President instead of taking the evidence of the witnesses viva voce agreed with the consent of Counsel for the parties, to allow the witnesses to confirm the correctness of the depositions of their evidence at the former trial.

Held: as the witnesses were available to the Court, the reception of the evidence of their depositions in a former trial ought not to be allowed.

CIVIL APPEAL.

C. S. Jayaswal for the appellant.

W. H. Sault for the respondents.

Cur. Adv. Vult.

The facts appear sufficiently from the judgment.

Bellamy, J.: — This is an appeal from the President of the Sessions Court at Malacca.

On the 21st August, 1952 the plaintiff brought an action against the defendants in the Sessions Court at Malacca claiming a sum of $902 being the balance of the price of five Singer sewing-machines alleged to have been sold and delivered by him to the defendants. The defendants put in a defence in which they denied the existence of the alleged contract of sale between themselves and the plaintiff and the alleged delivery of the sewing-machines to them and stated *inter alia* that the sewing-machines were bought by one Hong Boon Pin, a man formerly in their employment, who in so buying the sewing-machines from the plaintiff was acting on his own behalf and without the authority of the defendants. At the hearing on the 22nd September, 1952 the President gave judgment in favour of the defendants and dismissed the plaintiff's suit with costs. The plaintiff thereupon appealed to this Court against this decision and he applied for leave to call fresh evidence. Abbott, J., allowed the appeal [(1953) M.L.J. 59] and made an order that there should be a "fresh trial" and that the plaintiff should be at liberty to adduce fresh evidence as prayed. The case came on for hearing before another President on the 2nd April, 1953 and he found in favour of the defendants, dismissing the plaintiff's claim. From this decision the plaintiff now appeals to this Court.

At the hearing of this appeal a preliminary question was raised by the Court as to the propriety of the admission of certain evidence which was received by the President, upon the application of, and by agreement between, both Counsel of the parties, and an adjournment was granted to enable Counsel to consider and to argue it.

It is necessary to set out the very peculiar course which the proceedings took before the President. The parties were represented by Counsel and appeared, together with their witnesses, before the President on the day appointed for the new trial. Counsel for the plaintiff, having referred to the order of Abbott, J., directing a re-hearing and authorising the plaintiff to adduce the additional evidence of one Ismail bin Hassan, whose affidavit had been filed in this Court by the plaintiff in support of his application for leave to call further evidence, suggested to the President that the evidence of this witness might be given either by affidavit, in which case the witness was available for cross-examination, if required by the defendants, or by examination *viva voce* in open Court in the usual way. Counsel for the defendants, according to the President's note of the proceedings, thereupon expressed his agreement "to accept evidence as so far given". The President's note does not disclose if Counsel for the plaintiff agreed to this course being taken, but I was informed at the Bar that it had been agreed between both Counsel of the parties that the evidence of the parties and of their witnesses in the former hearing on the 22nd September, 1952 should be used and read at the re-hearing on the 2nd April, 1953 and that neither the parties nor their witnesses in the former hearing should be further examined or cross-examined in the new trial. In face of this agreement between Counsel of the parties the President did not insist on their evidence being heard *viva voce* in open Court, but he approved the course agreed upon by Counsel. Thereupon the parties and their respective witnesses were called individually and, the deposition in the former trial having been read to him, each one on oath merely confirmed the correctness of his evidence in the former trial. Ismail bin Hassan was also called and, having confirmed like the others the correctness of his affidavit filed in this Court which was also read, he was cross-examined on his affidavit. Apart from the